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IN THE

Supreme Court of the United States

NO. 741

FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA,

Appellant,

vs.

THE FIRST NATIONAL BANK OF HOMESTEAD, HOMESTEAD, FLORIDA
and
OKALOOSA NATIONAL BANK AT NICEVILLE, NICEVILLE, FLORIDA

Appellees.

JURISDICTIONAL STATEMENT OF APPELLANT

EARL FAIRCLOTH
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Appellees.

JURISDICTIONAL STATEMENT OF APPELLANT

PRELIMINARY STATEMENT

The Appellant, FRED O. DICKENSON, JR., Comptroller of the State of Florida, will be referred to herein as the Comptroller. The Appellees, THE FIRST NATIONAL BANK OF HOMESTEAD, FLORIDA and OKALOOSA NATIONAL BANK AT NICEVILLE, FLORIDA, will be referred to as the Banks. Defendants in the Court below, THE FLORIDA REVENUE COMMISSION and J. ED STRAUGHN, DIRECTOR OF REVENUE OF THE STATE OF FLORIDA, are not parties in this appeal.

The opinion of the Court below is as yet unreported, so far as the Comptroller has been able to ascertain.

STATEMENT OF JURISDICTION

This appeal is taken from the Order of a 3-Judge Federal Court pursuant to 28 U.S.C.A. §1253.

The date of the entry of the Order, Judgment, or decree appealed from is August 19, 1968.

The Comptroller's Notice of Appeal was filed on September 17, 1968.

We feel that jurisdiction is conferred on the Supreme Court by 28 U.S.C.A. §1253, which provides:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting

> or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges. June 25, 1948, c. 646, 62 Stat. 928."

The Order of the 3-Judge Federal Court provides in part:

> ". . . It is therefore ORDERED that the defendants jointly and severally are restrained and enjoined from levying, assessing or collecting (a) sales and use taxes levied on goods, services and rentals purchased by plaintiffs, (b) intangible personal property taxes on mortgages owned and recorded by plaintiffs, (c) documentary stamp taxes on notes, mortgages, or other evidences of debt *held by plaintiffs,* and on shares of stock and capital debentures *issued by plaintiffs.* . . ." (emphasis supplied)

Thus the lower Court's Order is an order *enjoining* the Comptroller and other defendants from collection of the taxes on the documents, intangibles, and transactions as set forth therein. Therefore, jurisdiction for this appeal rests in the United States Supreme Court.

Also see the cases of *Florida Lime & Avocado Growers, Inc. v. Jacobsen,* Cal. 1960, 80 S.Ct. 568, 362 U.S. 73, 4 L.Ed. 2d 568, and *Radio Corp. of America v. U.S.,* D.C. Ill. 1950, 95 F.Supp. 660, affirmed 71 S.Ct. 806, 341 U.S. 412, 95 L.Ed. 1062.

The State Statutes involved are Section 201.01, Florida Statutes, and Section 201.05, Florida Statutes. These are found in Volume 1, Florida Statutes, 1967 at pages 848 and 849, respectively. Pursuant to Rule 15, Supreme Court Rules, they are each set forth below:

"201.01 Documents taxable, generally.—There shall be levied, collected and paid the taxes specified in this chapter, for and in respect to the several documents, bonds, debentures or certificates of stock and indebtedness, and other documents, instruments, matters, writings, and things described in the following sections, or for or in respect of the vellum, parchment, or paper upon which such document, instrument, matter, writing, or thing, or any of them, are written or printed *by any person, who makes, signs, executes, issues, sells, removes, consigns,* assigns, or ships the same, *or for whose benefit or use the same are made, signed, executed, issued, sold, removed, consigned, assigned, or shipped in the state.* Provided further that the documentary stamp taxes required under this chapter shall be affixed to and placed on all recordable instruments, requiring documentary stamps according to law, prior to recordation. On mortgages where the stamps are on the notes, a notation shall be made on the mortgage that the proper stamps and the amount of same have been placed on the notes.

"201.05 Tax on stock certificates.—On each original issue, whether organization or reorganization, of cer-

tificates of stock or shares however designated *issued in the state,* or certificates of profits, or of interest in property or accumulations, *by any corporation or by any joint stock company or other association* as set forth in §201.04, on each one hundred dollars of face value, or fraction thereof, the tax shall be fifteen cents; provided, that where a certificate is issued without face value, the tax shall be fifteen cents on each one hundred dollars of actual value or fraction thereof. The stamps representing the tax imposed by this section shall be attached to the stock books, and not to the certificates issued." (Emphasis supplied)

Since Section 201.04, Florida Statutes, is referred to in Section 201.05, Florida Statutes, it, being somewhat lengthy, is set forth in the Appendix attached hereto. (A–1)

QUESTIONS PRESENTED

1. MAY THE STATE OF FLORIDA IMPOSE DOCUMENTARY STAMP TAXES ON NOTES, MORTGAGES, OR OTHER EVIDENCES OF DEBT *HELD* BY PLAINTIFFS AND ON SHARES OF STOCK AND CAPITAL DEBENTURES *ISSUED* BY PLAINTIFFS?

2. WAS THE THREE-JUDGE FEDERAL COURT CORRECT, IN *RESTRAINING* AND *ENJOINING* THE DEFENDANT, FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA,

FROM LEVYING, ASSESSING, OR COLLECTING DOCUMENTARY STAMP TAXES ON NOTES, MORTGAGES, OR OTHER EVIDENCES OF DEBT *HELD* BY PLAINTIFFS AND ON SHARES OF STOCK AND CAPITAL DEBENTURES *ISSUED* BY PLAINTIFFS?

STATEMENT OF THE CASE

This appeal is taken from a decision entered by a 3-Judge Federal Court in the Northern District of the State of Florida, Tallahassee Division. This 3-Judge Federal tribunal entered its Order found herein in the Appendix. (A–2)

The Plaintiff national banks filed a complaint seeking a declaratory judgment and an injunction pursuant to 28 U.S.C. 2201 and 2202, and other applicable law. The three Defendants responded with a motion to dismiss. One of the original Plaintiffs, Greater Miami Clearing Association, Miami, Florida, moved to voluntarily dismiss itself from the action. This motion was granted by the Court. After the Plaintiffs had filed certain motions to strike, both moved for a summary judgment.

The Court responded by entering its attached order and enjoining the named Defendants from the collection of the taxes as set forth in the order.

The order of the 3-Judge Federal Court provides in part:

". . . It is therefore ORDERED that the defendants jointly and severally are restrained and enjoined from levying, assessing or collecting (a) sales and use taxes levied on goods, services and rentals purchased by plaintiffs, (b) intangible personal property taxes on mortgages owned and recorded by plaintiffs, (c) documentary stamp taxes on notes, mortgages, or other evidences of debt *held by plaintiffs*, and on shares of stock and capital debentures *issued by plaintiffs*. . . " (emphasis supplied)

This appeal was then timely taken pursuant to the provisions of 28 U.S.C.A. Section 1253.

The effect of the lower Court's decision was to find that the previously set forth provisions of the Florida Statutes was void and inoperative insofar as they were applicable to national banks by virtue of the supremacy clause of the Federal Constitution. The lower Court bottomed its decision on the conclusion that national banks are Federal instrumentalities, and the case of *First Agricultural National Bank of Berkshire County v. State Tax Commission*, ____ U.S. ____, 20 L.Ed.2d 1138, 88 S.Ct. ____.

Our position is that the decision of the lower Court is inconsistent with previous Federal decisions and Federal law.

We will discuss the questions presented under the following two points:

POINT I

FEDERAL LAW DOES NOT PROHIBIT THE STATE OF FLORIDA FROM IMPOSING ITS DOCUMENTARY STAMP TAX ON *SHARES OF STOCK* AND *CAPITAL DEBENTURES ISSUED* BY NATIONAL BANKS.

POINT II

FEDERAL LAW DOES NOT PROHIBIT THE STATE OF FLORIDA FROM IMPOSING ITS DOCUMENTARY STAMP TAX ON NOTES, MORTGAGES, OR OTHER EVIDENCES OF DEBT *HELD* BY NATIONAL BANKS.

Each of these two points will be considered in order.

POINT I

FEDERAL LAW DOES NOT PROHIBIT THE STATE OF FLORIDA FROM IMPOSING ITS DOCUMENTARY STAMP TAX ON *SHARES OF STOCKS* AND *CAPITAL DEBENTURES ISSUED* BY NATIONAL BANKS.

In the First Agricultural National Bank case, supra, the Supreme Court of the United States bottomed its decision on 12 U.S.C. §548. It stated:

". . . For purposes of this case, the most important piece of banking legislation is 12 U.S.C. § 548[3] which originated as part of the Act of June 3, 1864, c. 106, § 41, 13 Stat. 111. *This section allows state taxation of national banks in any one of four specified ways in addition to taxes on their real estate.* . . ." (emphasis supplied)

Section 548, provides in part:

"The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. *The several States may* (1) *tax said shares, or* (2) *include* dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

1. (a) The imposition by any State of any of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: *Provided*, That bonds,

notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section. . .

2. The shares of any national banking association owned by nonresidents of any State shall be taxed by the taxing district or by the State where the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such nonresident shareholders.

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

4. The provisions of section 5219 of the Revised Statutes of the United States as in force prior to March 25, 1926, shall not prevent the legalizing, ratifying, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section. R.S. § 5219; Mar. 4, 1923, c. 267, 42 Stat. 1499; Mar. 25, 1926, c. 88, 44 Stat. 223." (emphasis supplied)

Thus there is positive congressional authority allowing the states to tax the shares of stock *issued* by national banks.

The State of Florida by constitutional mandate does *not* have an income tax. (See Article 9 Section 11 of the Florida Constitution (A-5)). Therefore, the State of Florida is without power to enforce a tax on any of that which is included in (2), (3), or (4) as listed in Section 548. The only tax which the State of Florida could impose pursuant to said section would be the tax on the shares of stock issued by the national banks. This is *expressly authorized* by Federal law. This is imposed uniformly on all banks within the State of Florida at the same identical rate as set forth previously herein in Section 201.05, Florida Statutes.

Therefore, the decision of the lower Court is inconsistent with paramount Federal law— to wit, Title 12, U.S.C.A., Section 548 and the First Agricultural National Bank case, supra. Therefore, we respectfully request that the Supreme Court of the United States take jurisdiction of this case. Therefore since the decision of the lower Court is clearly inconsistent with paramount Federal law and paramount United States Supreme Court decisions, the questions presented are so substantial as to require plenary consideration with briefs on the merits and oral argument for their further resolution. For the same reason the lower Court is in error in granting its permanent injunction against the Comptroller and should be reversed. The effect of the lower Court's decision is to *disallow* a state tax to which the state would otherwise be entitled. This tax is allowed by Federal law and Federal decisions construing said Federal law.

POINT II

FEDERAL LAW DOES NOT PROHIBIT THE STATE OF FLORIDA FROM IMPOSING ITS DOCUMENTARY STAMP TAX ON NOTES, MORTGAGES, OR OTHER EVIDENCES OF DEBT *HELD* BY NATIONAL BANKS.

Our position is that national banks are *not* immune from the State of Florida's documentary stamp taxes imposed pursuant to Section 201.01, Florida Statutes, on the various instruments set forth in Chapter 201, Florida Statutes. Our position is that the lower Court's ruling on this point is *inconsistent* with paramount Federal law and previous Federal judicial decisions.

In the case of United States v. Detroit, 355 US 466, 2 L Ed 2d 424, 78 S. Ct 474, the Court stated:

> "This Court has held that a State cannot constitutionally levy a tax directly against the Government of the United States or its property without the consent of Congress. M'Culloch v Maryland (US) 4 Wheat 316, 4 L ed 579; Van Brocklin v. Tennessee, 117 US 151, 29 L ed 845, 6 S Ct 670. *At the same time it is well settled that the Government's constitutional immunity does not shield private parties with whom it does business from state taxes imposed on them merely because part or all of the financial burden of the tax eventually falls on the Government. . .*" (emphasis supplied)

Further therein the Court stated:

> ". . . Today the United States does business with a vast number of private parties. In this Court the *trend has been to reject immunizing these private* parties from *nondiscriminating state taxes as a matter* of constitutional law. Cf. Penn-Dairies v Milk Control Commission, 318 US 261, 270, 87 L ed 748, 753, 63 S Ct 617. Of course this is not to say that Congress, acting within the proper scope of its power, *cannot confer immunity by statute* where it does not exist constitutionally. Wise and flexible adjustment of intergovermental tax immunity calls for political and economic considerations of the greatest difficulty and delicacy. *Such complex problems are ones which Congress is best quqlified to resolve.* As the Government points out Congress has already extensively legislated in this area by permitting States to tax what would have otherwise been immune.
>
> To hold that the tax imposed here on a private business violates the Government's constitutional tax immunity would improperly impair the taxing power of the State." (emphasis supplied)

Section 201.01, Florida Statutes, imposes the tax on any ". . . person, who makes, signs, executes, issues, sells, removes, consigns, assigns, or ships the same, or for whose benefit or use the same are made, signed, executed, issued, sold, removed, consigned, assigned, or shipped in the state. . ." Thus, it is imposed on both the maker of the

note, mortgage or evidence of debt and the person for whose benefit the note, mortgage, etc., is made. These are *private persons doing business* with the national bank *not* the national bank itself.

The Detroit case, supra, clearly found this to be *unobjectional* so long as it was nondiscriminatory. There is nothing in this record which would even *suggest* that this tax is imposed in a discriminatory manner. In point of fact, the taxes are imposed identically and uniformly on all lenders and borrowers whether national banks, state banks or otherwise.

Therefore, the decision of the lower Court is *inconsistent* with the previous pronouncement of the United States Supreme Court.

In the Detroit case, supra, the Court pointed out that *Congress* could *confer immunity on private persons by statute.* However, we have found *no* Federal statute dealing with national banks which has *conferred* tax immunity on private persons doing business with national banks.

We recognize that Section 548, previously set forth herein, deals with taxation of certain properties. However, it is our view that said section is related solely to *direct* taxation not *indirect.*

This view is consistent with the case of *Pittman v. Home Owners' Loan Corp.*, 308 US 20, 84 L Ed 11. That case too involved the imposition of a documentary stamp tax. That case held that the mortgage offered for recordation

by Home Owners' Loan Corp. of Washington, D. C., was *not* subject to the documentary stamp tax of the State of Maryland. However, it does so by utilizing and construing an express constitutional enactment *granting* the immunity. Therein the Court stated:

> ". . .The second suggested distinction rests upon the terms of the Home Owners' Loan Act. That provides[3] that the Home Owners' Loan Corporation, its franchise, capital, reserves and surplus, and its loans and income shall be exempt from all state or municipal taxes. The critical term, in the present relation, is '*loans*.' We think that this term, in order to carry out the manifest purpose of the broad exemption, should be construed as covering the entire process of lending, the debts which result therefrom and the mortgages given to the Corporation as security. The Home Owners' Loan Act requires that the loans made by the Corporation 'shall be secured by a duly recorded home mortgage.'[4] Both the mortgage and its recordation were indispensable elements in the lending operations authorized by Congress. We agree with the state court that there is no sound distinction which makes inapplicable the reasoning which was decisive in the Crosland Case. . . ."

In the case of *Federal Land Bank v. Crosland,* 261 US 374, 67 L Ed 703, 43 S. Ct. 385, 29 A.L.R. 1, there was also an express congressional enactment *granting* or *conferring* the immunity. In discussing the Crosland case, supra, the Court in the Pittman case, supra, stated:

". . . The court relied upon our decision in Federal Land Bank v. Crosland, 261 US 374, 67 L ed 703, 43 S Ct 385, 29 ALR 1. The question there related to a tax imposed by Alabama as a condition for the recording of a mortgage executed to a Federal Land Bank. The Federal Farm Loan Act of [July 17] 1916 provides that first mortgages executed to Federal Land Banks shall be deemed '*instrumentalities of the Government of the United States*, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation.' 39 Stat. at L. 360, 380, chap. 245, 12 USCA § 931. . ." (emphasis supplied)

Thus in both of these cases there was a congressional *enactment conferring* the immunity.

There is *no* such Federal congressional enactment *conferring* the immunity in the instant case.

We do not doubt or question but that Congress could *confer* such immunity on the notes, mortgages, loans, evidences of debt, advances and etc., of national banks. But it has not done so. It might be argued that the Home Owners' Loan Corp. in the Pittman case, supra, was not a Federal instrumentality while a national bank is. As to this we quote from the Court in the Pittman case, supra:

". . .The Home Owners' Loan Corporation is expressly declared to be an instrumentality of the United States (Home Owners' Loan Act of [June 13] 1933, chap.

> 64, 48 Stat. at L. 128, 12 USCA § 1461) and the mortgage was acquired in that capacity. . . . (emphasis supplied)

Thus, since both were Federal instrumentalities the same rule is applicable to both, the rule being that unless Congress has expressly conferred such immunity it does not exist. This is the rule as regarding *indirect* taxation. This is the rule as it relates to private persons doing business with Federal instrumentalities. (This does not mean that we approve of the view that national banks are Federal instrumentalities.)

The Pittman case, supra, was relied on by the United States Supreme Court in the case of *Laurens F. S. & L. v. South Carolina Tax Com.*, 365 US 517, 5 L Ed. 2d 749, 81 S. Ct. 719. This case too involved a congressional enactment which exempted the loans of the Home Owners' Loan Corp. The Court construed the term "loans" as covering the entire process of lending, the debts which result therefrom and the mortgages given as security.

Thus in all three of these cases there was a positive congressional enactment *conferring* the immunity.

There is no such congressional enactment *conferring* immunity on the mortgages, notes, loans, advances, or other evidences of indebtedness of national banks. Thus since there is no enactment conferring such immunity no immunity could exist.

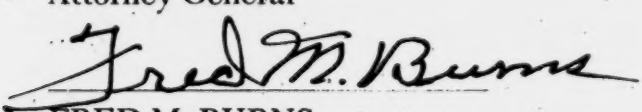
Therefore, the lower Court's decision is inconsistent with previous United States Supreme Court judicial pronouncements. Therefore, the lower Court should be reversed.

CONCLUSION

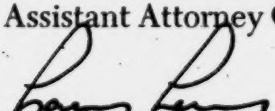
It is our view that the decision reached by the 3-Judge Federal Court below is inconsistent with prior Federal judicial pronouncements, and is inconsistent with paramount Federal statutory law. We asked that this Court take jurisdiction of this case and grant oral argument therein.

Respectfully submitted,

EARL FAIRCLOTH
Attorney General



FRED M. BURNS
Assistant Attorney General



LARRY LEVY
Assistant Attorney General

PROOF OF SERVICE

I, Fred M. Burns, one of the attorneys for Fred O. Dickinson, Jr., Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 14th day of November, 1968, I served copies of the foregoing Jurisdiction Statement of Appellant on the several parties thereto, as follows:

1. On The First National Bank of Homestead, Homestead, Florida and Okaloosa National Bank at Niceville, Niceville, Florida, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

TO: O. Ralph Matousek, Esq., Attorney for the First National Bank of Homestead, Homestead, Florida, 234 North Krome Avenue, Homestead, Florida 33030

TO: James E. Moore, Esq., Attorney for Okaloosa National Bank at Niceville, Niceville, Florida Post Office Box 476, Niceville, Florida

FRED M. BURNS
ATTORNEY FOR FRED O. DICKINSON, Jr.

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IN THE

Supreme Court of the United States

NO.

FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA,

Appellant,

vs.

THE FIRST NATIONAL BANK OF HOMESTEAD, HOMESTEAD, FLORIDA
and
OKALOOSA NATIONAL BANK AT NICEVILLE, NICEVILLE, FLORIDA

Appellees.

APPENDIX
OF APPELLANT

EARL FAIRCLOTH
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201.04 Tax on bills of sale, agreements, transfers, etc., of stock or shares in corporations and interests therein.—

(1) On all sales, agreements to sell or memoranda of legal title to shares, or certificates of stock or profits or interest in property or accumulations in any corporation, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock interest rights or not, on each one hundred dollars of face value or fraction thereof the tax shall be fifteen cents; and where such shares are without par or face value the tax shall be fifteen cents on each one hundred dollars of actual value or fraction thereof but not to exceed fifteen cents on each share; provided, that in case of sale, where evidence of transfer is shown only by the books of the corporation, the stamps shall be placed upon such books of the corporation; and where the change of ownership is by transfer of the certificate, the stamps shall be placed upon the certificates; and in case of an agreement to sell or where the transfer is made by delivery of the certificate assigned in blank, there shall be made and delivered by the seller to the buyer a bill or memorandum of such sale, to

which the stamp shall be affixed; and every bill or memorandum of sale or agreement to sell before mentioned, shall show the date thereof, the name of the seller, the amount of the sale, and the matter or things to which it refers. Any person or corporation liable to pay the tax as herein provided, or anyone who acts in the matter as agent or broker for such person or corporation, or who makes any such sale, or who in pursuance of any such sale, delivers any certificate or evidence of the sale of any stock, interest or right, or bill or memorandum thereof, as herein required, without having the proper stamps affixed thereto, with intent to evade the foregoing provisions, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished accordingly.

(2) For the purposes of this section, the term stock includes corporate stock, shares however designated in a joint stock company, trust in the nature of a common law trust or Massachusetts trust, association or other trust in which the trustees are associated together in substantially the same manner as directors in a corporation for the purpose of carrying on a business enterprise. Such shares are declared to be personal property, and not interests in land, notwithstanding the nature of the property of which the trust shall consist, unless provided otherwise in the trust instrument.

UNITED DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CIVIL ACTION NO. 1226

THE FIRST NATIONAL BANK OF HOMESTEAD, HOMESTEAD, FLORIDA
and
OKALOOSA NATIONAL BANK AT NICEVILLE, NICEVILLE, FLORIDA,

Plaintiffs,

vs.

FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA
and
THE FLORIDA REVENUE COMMISSION
and
J. ED STRAUGHN, DIRECTOR OF REVENUE, STATE OF FLORIDA,

Defendants.

Upon plaintiffs' respective motions for summary final judgment the Court finds that plaintiffs, as national banking institutions, created and existing pursuant to 12 U.S.C.A. §§ 21 et seq., are instrumentalities of the United States and are therefore immune from state and local taxes which are not within the purview of 12 U.S.C.A. § 548, *First Agricultural National Bank of Berkshire County v. State Tax Commission*, 1968, ____ U.S. ____, ____ S. Ct.

____, ____ L. Ed 2d ____, (36 U.S.L.W. 4686, June 17, 1968).

It is therefore ORDERED that the defendants jointly and severally are restrained and enjoined from levying, assessing or collecting (a) sales and use taxes levied on goods, services and rentals purchased by plaintiffs, (b) intangible personal property taxes on mortgages owned and recorded by plaintiffs, (c) documentary stamp taxes on notes, mortgages, or other evidences of debt held by plaintiffs, and on shares of stock and capital debentures issued by plaintiffs.

This Court is neither required to nor should pass upon the question of whether the plaintiffs are entitled to have refunded to them the taxes which are alleged to have heretofore been paid by plaintiffs.

This cause is remanded to the District Court for such further disposition as may be appropriate.

/s/ David W. Dyer
UNITED STATES CIRCUIT JUDGE

/s/ G. Harrold Carswell
UNITED STATES DISTRICT JUDGE

/s/ Charles R. Scott
UNITED STATES DISTRICT JUDGE

CONSTITUTION OF THE STATE OF FLORIDA

ART. IX

SECTION 11. Income tax prohibited; inheritance tax; exemption for head of family.—No taxes upon inheritances or upon the income of residents or citizens of this State shall be levied by the State of Florida, or under its authority, and there shall be exempt from taxation to the head of the family residing in this State, household goods and personal effect to the value of Five Hundred ($500.00) Dollars, provided, however, that the Legislature may provide for the assessment, levying and collection of a tax upon Inheritances, or for the levying of Estate taxes, not exceeding in the aggregate the amounts which may by any law of the United States be allowed to be credited against or deducted from any similar tax upon Inheritances, or taxes on estates assessed or levied by the United States on the same subject, but the power of the Legislature to levy such Inheritance taxes, or Estate Taxes in this State, shall exist only so long as, and during the time, a similar tax is enforced by the United States against Florida Inheritances or Estates and shall only be exercised or enforced to the extent of absorbing the amount of any deduction or credit which may be permitted by the laws of the United States, now existing or hereafter enacted to be claimed by reason thereof, as a deduction or credit against such similar tax of the United States applicable to Florida Inheritances or Estates. The Legislature may provide for the appropriation of all taxes collected under this Article to such State, County, Municipal or Educational purposes as it may deem advisable.

In The

Supreme Court of the United States

October Term, 1968

No. 711

FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA,

Appellant,

v.

THE FIRST NATIONAL BANK OF HOMESTEAD, HOMESTEAD, FLORIDA,

and

OKALOOSA NATIONAL BANK, NICEVILLE, FLORIDA,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION

MOTION TO DISMISS AND/OR AFFIRM

O. RALPH MATOUSEK,
234 North Krome Avenue,
Homestead, Florida 33030,
Attorney for Appellee,
The First National Bank
of Homestead.

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In The

Supreme Court of the United States

October Term, 1968

No. 741

FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA,

Appellant,

v.

THE FIRST NATIONAL BANK OF HOMESTEAD, HOMESTEAD, FLORIDA,

and

OKALOOSA NATIONAL BANK, NICEVILLE, FLORIDA,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION

MOTION TO DISMISS AND/OR AFFIRM

MOTION TO DISMISS AND/OR AFFIRM

Appellee, The First National Bank of Homestead, Homestead, Florida, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves to dismiss and/or affirm the appeal herein on the grounds that the decision of the three-judge District Court below was correct as to law and fact and that the question presented is so unsubstantial as not to need further argument.

STATEMENT

This appeal is taken from an Order entered by a three-judge Federal Court in the Northern District of the State of Florida, Tallahassee Division, on August 19, 1968.

The lower Court based its decision upon the provisions of 12 U.S.C. 548 and the case of First Agricultural National Bank of Berkshire County v. State Tax Commission, _____ U.S. _____, 20 L.Ed.2d 1138, 88 S.Ct. _____.

ARGUMENT ON APPELLANTS POINT I

Appellant alleges in Point I that 12 U.S.C. 548 permits the Appellant to levy and collect documentary stamp taxes on the shares of stock and capital debentures issued by National Banks based on option (1) of the Statute which permits the various states to tax the shares of stock of National Banks. But the Statute further requires that the tax levied under the first option must not be levied at a greater rate than that

levied on other "moneyed capital" in the hands of persons in competition with National Banks. As is clear from the language of the Statute, Congress intended the first option to be a moneyed capital tax, i.e., a tax levied on the capital of National Banks.

Pursuant to this first option under 12 U.S.C. 548, the State of Florida already levies a capital tax on the shares of stock of National Banks. This tax takes the form of an intangible personal property tax levied on the shares of stock of all National Banks in Florida, at the rate of one mill per dollar of just valuation of the stock and collected annually under the provisions of Section 199.141 Florida Statutes.

Appellees have no quarrel with this tax levied on the shares of stock of National Banks, and Appellees include herein in the Appendix a reproduction of the latest receipted intangible tax bill.

However, this tax levied under said first option of 12 U.S.C. 548 must necessarily be "in lieu of" all other tax options permitted by the Statute. In violation of this requirement, Appellant asserts that in addition to this aforementioned tax on the capital of Appellees he may also levy a documentary tax on the issuance by National Banks of their stock shares and their capital debentures. Therefore, this documentary stamp tax is not a capital tax permitted under the first option of 12 U.S.C. 548,

but actually a securities issuance tax not sanctioned by the Statute.

Moreover, Appellant asserts that he has authority to tax the issuance of capital debentures of National Banks. Said debentures may be issued by National Banks pursuant to the authority of the Comptroller of the Currency as shown in 12 C.F.R. 14.5. Although the Comptroller of the Currency treats such debentures as "capital" for certain banking purposes, they actually remain borrowed money, not equity money, and are subject to the borrowing limitations contained in 12 U.S.C. 82. These debt obligations are superior to capital stock, but subordinated to the rights of depositors and other creditors of the issuing Bank, as shown in 12 C.F.R. 14.5(b). Further, said debentures cannot be deemed to be shares of a National Bank for purposes of the first option of 12 U.S.C. 548 for one other reason; namely, at the time that the original form of 12 U.S.C. 548 was enacted by Congress as part of the National Bank Act of 1864, National Banks did not issue capital debentures, and therefore, said obligations could not be deemed to be shares of stock within the contemplation of Congress.

ARGUMENT ON APPELLANT'S POINT II

Section 201.01 Florida Statutes imposes documentary stamp taxes on any person who makes, issues, creates, or sells notes, mortgages, and other evidences of

debt, as well as on the person for whom such note, mortgage or other evidence of debt is made, issued, or to whom sold. Thus the State of Florida can treat either the maker of a note or the payee of a note liable as the taxpayer. At no time have Appellees in the instant case challenged the right of Appellant to levy and collect documentary stamp taxes from Appellant's customers who issue, make or sell such notes, mortgages or other evidences of debt. Appellees' challenge only goes to Appellant's assertion that Appellee's are liable for the payment of the tax should Appellant wish to collect the tax from Appellee. Appellees assert that they cannot be held liable as taxpayers under Section 201.01 et seq. Florida Statutes because of the overriding authority of the Federal Statutes.

All notes, mortgages and other evidences of debt acquired and owned by Appellees are their personal property, and all of the personal property of Appellees, be it tangible or intangible, chattels or choses in action, is exempt from the taxing power of the State of Florida as is clearly and emphatically set forth by the Supreme Court in First Agricultural National Bank of Berkshire County v. State Tax Commission, _____ U.S. _____ (1968). In that case, Mr. Justice Black delivered the opinion of the Court and traced the long line of decisions beginning with McCulloch v. Maryland, 4 Wheat. 316 (1819), firmly establishing the proposition that the States are without power, unless specifi-

cally authorized by Congress, to tax National Banks. Further, Mr. Justice Black reviewed the history of 12 U.S.C. 548, which originated as part of the Act of June 3, 1864, c. 106, §41, 13 Stat. 111, and declared that 12 U.S.C. 548 clearly was intended to prescribe the only ways in which the States can tax national banks. And there is no authority in 12 U.S.C. 548 permitting Appellant to tax the notes, mortgages and other evidences of debt owned by Appellees.

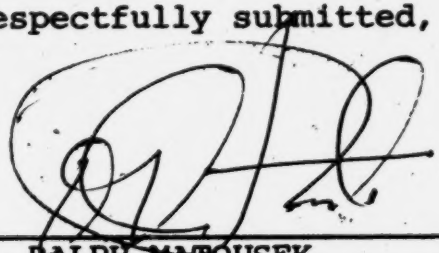
Appellant in his Jurisdictional Statement makes the same error as did the Appellee in the above-mentioned First Agricultural National Bank of Berkshire County case in asserting that the tax immunities of national banks must be Congressionally conferred. Both Congress and the Supreme Court have always deemed 12 U.S.C. 548 to be the sole measure as also the outer limit of State taxation of national banks. Therefore, unless the particular tax is specifically sanctioned by Congress under 12 U.S.C. 548, it is forbidden to the States.

CONCLUSION

It is Appellees' view that the decision of the three-judge Federal Court below is plainly correct both as to law and fact and clearly consistent with

12 U.S.C. 548 and with the numerous pronouncements of the Supreme Court. We request that this Court refuse to take jurisdiction of this case and that the Order of the District Court should be affirmed.

Respectfully submitted,



O. RALPH MATOUSEK
Counsel for Appellee,
The First National Bank
Of Homestead.

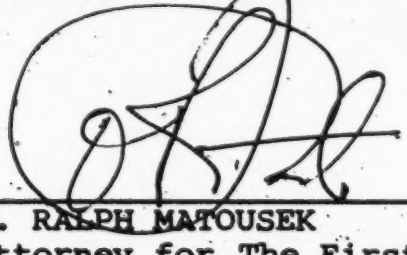
PROOF OF SERVICE

I, O. Ralph Matousek, attorney for The First National Bank of Homestead, one of the Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 13th day of December, 1968, I served copies of the foregoing Motion to Dismiss And/Or Affirm of Appellee on the several parties thereto, as follows:

1. 1. On the Okaloosa National Bank at Niceville, Niceville, Florida, Appellee, and Fred O. Dickinson, Jr., Appellant, by mailing copies of same in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

TO: James E. Moore, Esq., attorney for Okaloosa National Bank at Niceville, Niceville, Florida
Post Office Box 476
Niceville, Florida

TO: Fred M. Burns, Esq., attorney for Fred O. Dickinson, Jr.,
Office of the Attorney General
The CAPITOL
Tallahassee, Florida 32304



O. RALPH MATOUSEK
Attorney for The First National Bank of Homestead,
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234 North Krome Avenue,
Homestead, Florida 33030

In The

Supreme Court of the United States

October Term. 1968

No. 741

FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA,

Appellant,

v.

THE FIRST NATIONAL BANK OF HOMESTEAD, HOMESTEAD, FLORIDA,

and

OKALOOSA NATIONAL BANK, NICEVILLE, FLORIDA,

Appellees.

APPENDIX OF APPELLEE

TAX NOTICE-RECEIPT 1967

INTANGIBLE TAX STATE OF FLORIDA

MAKE CHECKS PAYABLE TO: COUNTY TAX COLLECTOR
DADE COUNTY COURTHOUSE
MIAMI, FLA.
33130

VALUATION		
CLASS "A" @ 1/10 MILL	CLASS "B" @ 1 MILL	CLASS "D" @ 1 MILL
	869020	

PAGE	FOLIO NUMBER
760	5 56-06090 8

FIRST NATL BK OF HOMESTEAD
& AS AGT
4 N KROME AVE
HOMESTEAD FLA

THIS BECOMES A RECEIPT ONLY WHEN VALIDATED BELOW.

CLASS "A" TAX	
CLASS "B" TAX	869.02
CLASS "D" TAX	
ASSESSED PENALTY	
YOUR TOTAL TAX	869.02

J09088 DEC 167 83426 ℔

AMOUNT DUE IF PAID IN → SEE OTHER SIDE	869.02	860.33	851.64	842.95	834.26
	MARCH	FEBRUARY	JANUARY	DECEMBER	NOVEMBER

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IN THE

Supreme Court of The United States

October Term, 1968

No. 741

FRED O. DICKINSON, JR., COMPTROLLER
OF THE STATE OF FLORIDA.
Appellant.

v.

THE FIRST NATIONAL BANK OF HOMESTEAD.
HOMESTEAD, FLORIDA.
and
OKALOOSA NATIONAL BANK.
NICEVILLE, FLORIDA.
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA. TALLAHASSEE DIVISION

PETITION FOR RE-HEARING

EARL FAIRCLOTH
Attorney General
The Capitol
Tallahassee, Florida 32304

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IN THE

Supreme Court of The United States

October Term, 1968

No. 741

FRED O. DICKINSON, JR., COMPTROLLER

Appellant.

OF THE STATE OF FLORIDA.

v.

THE FIRST NATIONAL BANK OF HOMESTEAD.
HOMESTEAD, FLORIDA.

and

OKALOOSA NATIONAL BANK.
NICEVILLE, FLORIDA.
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA. TALLAHASSEE DIVISION

PETITION FOR RE-HEARING

Appellant presents it's Petition for a Re-Hearing of the above entitled cause, and, in support thereof, respectfully shows:

GROUNDS FOR RE-HEARING

I

At the time of the issuance of the opinion of the Supreme Court dated January 20, 1969, this case was pending in the Supreme Court on the Jurisdictional Statement of Appellant pursuant to 28 U.S.C. § 1253, to which the Appellees had filed their Motion to Dismiss and/or Affirm.

The Opinion of the Court in this cause was as follows:

> "Per Curiam.
>
> The motion to affirm is granted and the judgment is affirmed.
>
> Mr. Justice Stewart is of the opinion that probable jurisdiction should be noted.
>
> Mr. Justice Fortas took no part in the consideration or decision of this case."

The Court thus disposed of this case on its merits without consideration of a printed record, briefs of counsel, or allowing the Appellant the opportunity to give oral argument. The Court did so even though Appellees' Motion

and Appellant's jurisdictional statement set out the reasons why the decision of the Three-Judge District Court is incorrect and must be reversed or remanded for further clarification.

II

Appellees, in their Motion, relied on the case of **First Agricultural National Bank of Berkshire County vs. State Tax Commission,** 392 U. S. 339, (1968). This case involved a sales and use tax where the legal incidence of the tax was said to have been imposed on a Federal instrumentality. This Court found it unnecessary to determine the Constitutional and factual questions of whether national banks should today be considered tax immune as Federal instrumentalities.

The present case involves, among other things, the collection of documentary stamp taxes where the legal incidence of the tax falls on private parties and where national banks, as in the case of competitive state banks and like institutions, are mere collection agents for the State of Florida. This Court has ruled on previous occasions that national banks can be made agencies of the state for collection purposes. **Merchant', etc., Bank v. Pennsylvania,** 167 U. S. 461 (1897); **State v. Clement Nat. Bank,** 78 A. 94, 84 Vt. 167, aff'd 231 U. S. 120, (1911). Appellees conceded this fact on Page 5 of their Motion to Dismiss and/or Affirm and attempted to read this "collection agent" exception into the Order of the Three-Judge

District Court. It is not there. The result is confusion in the State of Florida and the nation in that the effect of such immunity poses further questions of economic advantage and discrimination. It is imperative that this court resolve the issues and/or clarify the Order of the Three-Judge District Court after hearing the merits of the cause.

III

National banks have evolved from governmental in 1864 to private organizations for profit today with a concomitant withdrawal of governmental functions. With respect to the imposition of Florida's non-discriminatory documentary stamp tax on notes, mortgages or other evidences of debt held by national banks, the foundation of which partially lies upon the repeal of 26 U.S.C., § 4361 by Public Law 89–44, Title 4, Paragraph 401(b), 79 Stat. 148 as noted in § 201.021, Florida Statutes (1967), it is not only paradoxical but impossible to reconcile the decision on appeal with the ruling of the United States Treasury Department.

The Treasury Department in which the Comptroller of the Currency serves (see e.g. United States Government Organization Manual, 1968–69, pp 97, 107), ruled in 1963 that national banks are not an "agency or instrumentality of the United States" under the Internal Revenue Code, as follows:

Section 4384.—Liability For Tax 26 CFR 47.4384-1: Liability for tax. Rev. Rul. 63–217

"National Banks frequently are parties to conveyances of realty. Under the provisions of section 4384 of the Internal Revenue Code of 1954, as amended, the United States or any agency or instrumentality thereof shall not be liable for the documentary stamp tax on conveyances of realty, imposed by section 4361 of the Code, with respect to an instrument to which it is a party.

"Held, the exemption from liability provided by section 4384 of the Code does not apply to a national bank which is a party to a conveyance of realty, **since such a bank, being a private corporation, is not an 'agency or instrumentality' of the United States** for purposes of that section of the Code." (Emphasis Supplied.)

IV

Apart from any Constitutional or factual issues involved herein, there is positive congressional authority under 12 U.S.C. 548 for the uniform imposition and levy on all banks, at the same identical rate as set forth in Section 201.15, Florida Statues (1967), of a documentary stamp tax on shares of stock and capital debentures issued by national banks and Appellees concede in their Motion to Dismiss and/or Affirm that the intangible personal

property tax levied on shares of stock under the provisions of § 199.141 is not in issue. Said tax is not levied at a greater rate than that levied on other "moneyed capital." The inconsistencies of the decision of the Lower Court with paramount Federal law and the decisions of the Supreme Court of the United States raise substantial questions that require consideration on the merits.

V

This case involves substantial Constitutional issues under the "equal protection" provision and the Supremacy Clause of the Tenth Amendment to the United States Constitution. This Court has not resolved these issues as they apply to private profit making banks classified as national banks, private profit making banks classified as state banks and other similar competitive institutions. These Constitutional issues are also raised in the New York case of **Liberty National Bank & Trust Co. v. Buscaylia** (Ct. App. N. Y. 1967), 21 N. Y. 2d 357, 235 N. E. 2d 101, reargued January 24, 1969, in relation to the sales and use tax and both cases warrant a hearing before this Court on the merits.

CONCLUSION

In the light of the above, we respectfully submit that this Court should grant this Petition for Re-Hearing and give to the parties an opportunity to brief the cause on its merits and orally argue the great questions of law presented herein or, in the alternative, should vacate the decision of the Federal Three-Judge Court below, and remand the cause for further clarification.

Respectfully submitted,

Earl Faircloth
Attorney General

T. T. Turnbull
Chief Trial Counsel

Paul Reed Toomey
Chief, Tax Division

CERTIFICATE

I hereby certify that on the_____day of February, 1969, I served a copy of the foregoing Petition for Re-Hearing upon the several parties as follows:.

On The First National Bank of Homestead, Homestead, Florida, and Okaloosa National Bank at Niceville, Niceville, Florida, by mailing copies in duly addressed envelopes, with first-class postage prepaid, to their respective attorneys of record, as follows:

TO: O. Ralph Matousek, Esq., Attorney for the First National Bank of Homestead, Homestead, Florida
234 North Krome Avenue, Homestead, Florida 33030

TO: James E. Moore, Esq., Attorney for Okaloosa National Bank at Niceville, Niceville, Florida
Post Office Box 476, Niceville, Florida

T. T. TURNBULL
ATTORNEY FOR
FRED O. DICKINSON, JR.

T. T. TURNBULL
Office of the Attorney General
The Capitol
Tallahassee, Florida 32304

CERTIFICATE OF COUNSEL

I, T. T. TURNBULL, do hereby certify that the above and foregoing Petition for Re-Hearing is presented in good faith and not for delay.

EARL FAIRCLOTH
Attorney General

T. T. TURNBULL
Chief Trial Counsel

PAUL REED TOOMEY
Chief, Tax Division

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IN THE

Supreme Court of the United States

October Term, 1968

No. 741

FRED O. DICKINSON, JR., Comptroller of the State of Florida,

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THE FIRST NATIONAL BANK OF HOMESTEAD, Homestead, Florida,
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OKALOOSA NATIONAL BANK, Niceville, Florida,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA,
TALLAHASSEE DIVISION

BRIEF *AMICUS CURIAE* ON BEHALF OF THE STATE OF NEW YORK IN SUPPORT OF PETITION FOR REHEARING

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Solicitor General

ROBERT W. BUSH
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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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IN THE

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION

BRIEF *AMICUS CURIAE* ON BEHALF OF THE STATE OF NEW YORK IN SUPPORT OF PETITION FOR REHEARING

Statement

This brief is submitted on behalf of the State of New York in support of appellant's petition for rehearing of the captioned case or, in the alternative, for a remand to the Court below for reconsideration. The interests of the State of New York and all other States similarly situated

with respect to the taxes involved are adversely jeopardized by the decision herein upon the substantial revenues derived from such taxes. As to New York State, the revenue derived from its sales and use taxes (Tax Law, Art. 28, 59 McKinney's Consolidated Laws of New York, §§ 1101, *et seq.*), as well as from its recording mortgage tax (Tax Law, Art. 28, *ibid.*, §§ 250, *et seq.*), run into several millions of dollars annually which are collected from both State and national bank transactions which are presently and statutorily subject to both tax impositions.

Question Presented

Whether the States have the constitutional power under the Tenth Amendment to the Constitution of the United States to impose State and local sales and use taxes upon private retail sales transactions entered into by national banks, or possess the power to impose documentary stamp taxes upon private transactions when such banks, as they function today as *private business corporations,* are no longer Federal instrumentalities so as to be entitled to either implied constitutional or statutory immunity.

The Tenth Amendment provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the State, are reserved to the States respectively, or to the people."

ARGUMENT

The Supreme Court decision in the *First Agricultural Bank* case is not dispositive of the issues, since this Court did not consider the Tenth Amendment and national banks, as they function today, are not Federal instrumentalities and Congress has no constitutional authority by virtue of the Tenth Amendment to immunize them by § 548 of the National Banking Act.

The decision in *First Agricultural Bank* is completely distinguishable.

This Court's decision in *First Agricultural National Bank* v. *Tax Commission,* 392 U. S. 339 (1968) does not dispose of the present constitutional questions arising under the Tenth Amendment to the Federal Constitution as to the sovereign taxing powers of the States thereunder. This question is so real and substantial as to warrant a full rehearing thereon in order to resolve "basic constitutional issues of the utmost concern"* (*cf., e. g., Reid* v. *Covert,* 354 U. S. [1956] where rehearing was granted following decision on the merits).

The opinion of the majority (BLACK, J.) in the *First Agricultural Bank* case, *supra,* discloses that this Court decided that case upon non-constitutional ground, as follows (*ibid.,* p. 341):

> "Because of pertinent congressional legislation in the banking field, we find it *unnecessary to reach the constitutional question* of whether today national banks should be considered nontaxable as *federal instrumentalities.*" (Emphasis added.)

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* Indeed, in the area of constitutional immunity, this Court has said "that the duty rests in this Court to decide for itself facts or constructions upon which federal constitutional issues rest." (*Kern-Limerick, Inc.* v. *Scurlock,* 347 U. S. 110, 121 [1953].)

This appears to be the result of the Court's custom in the field of constitutional immunity to resolve disputes upon the basis of statutory construction by avoiding constitutional issues where it is assumed that the statute should govern (12 U. S. C. A. § 548; see, *e. g., Carson* v. *Roane-Anderson Co.,* 342 U. S. 232, 236 [1951]; *Federal Land Bank* v. *Kiowa Co.,* 368 U. S. 146, 156 [1961].) We submit, however, that this Court's construction of § 548, *supra,* is valid *only* if national banks, as they function today, are *true* Federal instrumentalities. If not, they then are merely *private* business corporations as to which the Congress has absolutely no constitutional authority to confer immunity from State taxes, since the constitutional justification for § 548 no longer exists, and Congress cannot divest the States of their sovereign taxing powers under the Tenth Amendment, *supra,* and such amendment is activated so as to permit the imposition of the taxes here involved. This constitutional question was *neither argued, briefed nor passed upon* by this Court either in the instant case or in the *First Agricultural Bank* case, *supra.*

The New York Court of Appeals unanimously held in 1967 in *Liberty National Bank and Trust Company* v. *Buscaglia, et al.,* 21 N. Y. 2d 357 that national banks were not Federal instrumentalities and were entitled to neither constitutional nor statutory immunity. The State of New York opposed Liberty Bank's jurisdictional statement in this Court in a motion to either affirm or dismiss the appeal upon the grounds that the Tenth Amendment to the Federal Constitution was supreme, since Congress had no constitutional authority to immunize national banks from State and local sales taxation if they were no longer Federal instrumentalities entitled to tax immunity. Following this Court's decision in the *First Agricultural Bank case, supra,* Liberty National Bank petitioned the New

York State Court of Appeals for reargument and such reargument was ordered on October 10, 1968 (22 N. Y. 2d 973), following which Liberty National Bank moved this Court to dismiss its appeal upon the ground that there was "no longer a final judgment which can be reviewed by this Court and the appeal docketed on June 10, 1968 is now moot". This Court dismissed the appeal pursuant to Rule 60 on November 1, 1968. Following reargument in the New York Court of Appeals, that Court on February 19, 1969 ruled:

> "Upon reargument:
>
> Order affirmed, without costs, upon the constraint of recent Supreme Court decisions (*Dickinson* v. *First National Bank of Homestead*, ___ U. S. ___, 37 U. S. Law Week 3267, decided January 20, 1969; *First Agricultural Bank of Berkshire County* v. *State Tax Commission*, 393 U. S. 339).
>
> No opinion.
>
> All concur."

The Tenth Amendment yields to the supremacy clause of the Federal Constitution *only* when Federal supremacy exists. However, national banks, as they function today, are not true Federal instrumentalities, as we shall demonstrate. They are merely *private* business corporations to which no constitutional immunity from State taxation can be conferred by Congress (see *e. g., Union Pacific Railroad Co.* v. *Penniston*, 85 U. S. 5 [1873]; *Western Union Tel. Co.* v. *Mass.*, 125 U. S. 530 [1887]; *Reagan* v. *Mercantile Trust Co.*, 154 U. S. 413 [1894]; *Central Pacific Railroad* v. *Calif.*, 162 U. S. 92, 125 [1895]; *Williams* v. *City of Talladega*, 226 N. Y. 404 [1912]; *Alward* v. *Johnson*, 282 U. S. 509 [1930]; *Union Bank and Trust Co.* v. *Phelps*, 288 U. S. 176 [1930]; *Broad River Power Co.* v. *Query*, 288 U. S. 178 [1932]; *Indian Territory Illuminating Oil Co.* v. *Board of*

Equalization, 288 U. S. 325 [1932]; *Susquehanna Co.* v. *Tax Comm.,* 293 U. S. 291 [1930].)

We further submit that this Court should re-examine the 1950 bill to amend § 548, *supra,* which was referred to in the majority opinion in the *First Agricultural Bank* case, *supra.* There it was said (392 U. S. 339, 346):

> "Finally, in 1950 a bill was sent to the Senate Committee on Banking and Currency which expressly permitted the levying of state sales and use taxes on national banks, but Congress did not pass it.[9] [9. See Hearing on S. 2547 before Subcommittee on Federal Reserve Matters of the Senate Committee on Banking and Currency, 81st Cong., 2d Sess., 9 (1950)]."

This quotation seems to have been adopted from a brief reference thereto in the *First Agricultural Bank's* brief (p. 21) which was *neither answered nor objected* to in the answering brief of the Massachusetts Tax Commission. In the light of subsequent Federal legislation, *infra,* sponsored by the Senate Banking Committee in the area of Federal instrumentalities, a full re-evaluation of the subcommittee report should be made because profound objections do exist with respect to Congressional intent. A fair reading of the entire report of the Banking Subcommittee shows no Congressional intent that any permissive legislation was needed in this area. On the contrary, the report clearly shows only that its proponents felt that the proposed Senate bill was *desirable* and that the Federal Government had no objections thereto. (See, also, *Cong. Rec.,* 81st Cong., 2d Sess., p. 17085.) Indeed, the subcommittee chairman himself noted its inconsequential effect by saying that the *McCulloch* case (*McCulloch* v. *Maryland,* 4 Wheat. 316) was one "involving an effort to tax the Bank of the United States by the State of Maryland in such a way that the Bank *could not have successfully operated*"

(emphasis added, *ibid.*, p. 2). It must be pointed out, too, that the Senate Banking and Currency Committee merely reported, in part, to the Senate in its "Summary of Activities" during the 81st Congress on the 1950 bill, Sen. 2457, *supra*, that "The bill was not reported as the session was drawing to a close and full attention of Committee was then focused on Defense Production Act." (*Cong. Rec.*, 81st Cong., 2d Sess., p. 17085.) There is, of course, *not one word* in the subcommittee's report which deals with the present question as to whether national banks are actually Federal instrumentalities. Therefore, since the 1950 bill was never reported out of the Senate Banking Committee for Senate vote and was never introduced in the House of Representatives it should not be construed as evidencing any Congressional intent at all, from which to even infer any judgment on the part of (1) the Senate Banking Committee, (2) the Senate itself or (3) to the House of Representatives. Indeed, subsequent action by the Senate Committee on Banking completely destroys any claim that national banks are Federal instrumentalities. The Senate Committee on Banking and Currency specifically reported in 1961 on those Federal corporations, financial institutions, or agencies of the Federal Government having *statutory tax exempt status*, for example, as follows: Federal Reserve Banks (12 U. S. C. 531), Federal Land Banks (*ibid.*, 931), Federal Farm Mortgage Corporation (*ibid.*, 1020f), Federal Intermediate Credit Bank (*ibid.*, 1111), Central Bank for Cooperatives (*ibid.*, 1138c), Federal Home Loan Bank (*ibid.*, 1433), Federal Savings and Loan Associations (*ibid.*, 1464), Federal National Mortgage Association (*ibid.*, 1716), Federal Savings and Loan Insurance Corporation (*ibid.*, 1725), Federal Housing Debentures (*ibid.*, 1747g), Federal Deposit Insurance Corporation (*ibid.*, 607), Reconstruction Finance Corporation

(*ibid.*, 607), Community Credit Corporation (*ibid.*, 713a-5), Certain Government Securities (31 U. S. C. 868), Public Housing Administration (42 U. S. C. 1405(e)) (see 1961 *U. S. Code Cong. and Admin. News,* Vol. 2, pp. 2006-2007). These named corporations, among others itemized by statute (Government Corporations Control Act [1945, as amended], Title 31, ch. 14, §§ 846 and 847) were either defined by Congress as "wholly owned Government Corporations" (41 such corporations) or as "mixed ownership Government Corporations" (4 such corporations) (*ibid.*, §§846, 847), and were also by the same Act, declared to be "*an agency or instrumentality of the United States*" (*ibid.*, § 869, emphasis added).

National banks, of course, were not included in either category, nor was this legislation ever called to the attention of this Court in the *First Agricultural* case, *supra.*

The legislative history of the Act* clearly disclosed that a "Government Corporation is a constitutional means of carrying into effect legitimate powers of the Federal Government"; that its intent was that "it prohibits the creation of any Government Corporation to act as an *agency* or *instrumentality* of the United States except by or pursuant to action of Congress, and requires those now operating under State charters to institute dissolution or liquidation proceedings on or before June 30, 1948, subject to reincorporation by act of Congress" (emphasis added; see also Title 31, *supra,* § 839); and that "It further provides that no corporation shall be *created, organized* or acquired hereafter by any officer or *agency* or *instrumentality* of the United States, except by act of Congress or pursuant to an

* *Senate Rep.* No. 694, 1945 by Senate Banking and Currency Committee, *U. S. Code Cong. Service,* 79th Cong., 1st Sess., 1945, pp. 888, 890 and 901.

act of Congress specifically authorizing such action" (emphasis added). Again, national banks have not been so designated by any act of Congress. Indeed, the Treasury Department in which the Comptroller of the Currency serves (see *e. g., United States Government Organization Manual*, 1968-69, pp. 97, 107), also ruled in 1963 that national banks are not an "agency or instrumentality of the United States" under the Internal Revenue Code, as follows (Internal Revenue Bulletin, Cum. Bul. 1963-2, p. 585):

> "Section 4384.—Liability for Tax
>
> 26 CFR 47.4384-1: Liability for Tax. Rev. Rul. 63-217
>
> "National Banks frequently are parties to conveyances of realty. Under the provisions of section 4384 of the Internal Revenue Code of 1954, as amended, the United States or any agency or instrumentality thereof shall not be liable for the documentary stamp tax on conveyances of realty, imposed by section 4361 of the Code, with respect to an instrument to which it is a party.
>
> "*Held*, the exemption from liability provided by section 4384 of the Code does not apply to a national bank which is a party to a conveyance of realty, *since such a bank, being a private corporation, is not an 'agency or instrumentality'* of the United States for purposes of that section of the Code." (Emphasis supplied.)

Parenthetically, the mortgage recording tax imposed by New York, for example, is not imposed upon national banks, in any event. Rather, the taxes imposed "on the privilege of recording the mortgage" (Tax Law, § 253, McKinney's Consolidated Laws of New York, Book 59), the constitutionality of which have been sustained and reviewed by this Court upon objections that it was imposed upon an alleged instrumentality of the United States

(*Matter of Silberblatt, Inc.* v. *Tax Commission*, 5 N. Y. 2d 635 [1959] cert. den. 361 U. S. 912). Indeed, this Court invited the Solicitor General of the United States "to file a brief setting forth his views as to the importance to the Federal Government of the issues involved". (361 U. S. 802, 912.) However, he erroneously and unsuccessfully urged (Brief, p. 4):

> "* * * This Court has held in cases involving similar tax statutes that, for Federal purposes, the tax is to be considered a tax upon the mortgage where it falls upon a corporation which is an agent or instrumentality of the United States. *Federal Land Bank* v. *Crosland*, 261 U. S. 374; *Pittman* v. *Home Owners' Corp.*, 308 U. S. 21. The rationale of these decisions would appear to be equally applicable here, since the corporations—although privately organized—are instrumentalities of the Federal Government."

Of course, both the *Federal Land Bank* and *Pittman* cases were distinguishable there, as well as here, because, as the New York Court of Appeals found in the *Silverblatt* case, *supra*, those cases were "inapplicable since they turned on federal statutes which expressly declared the Federal Land Bank and the Home Owners' Loan Corporation to be federal instrumentalities". (5 N. Y. 2d 641.) Moreover, the documentary stamp tax imposed by Florida which is required to be collected and remitted by the appellees is constitutional (see, *e. g.*, *Colorado Bank* v. *Bedford*, 310 U. S. 41 [1939]).

Long before the legislation, just referred to, however, Congress had also denied to national banks all claims to constitutional immunity. The *coup de grâce* concerning national bank immunity occurred in 1935 when the Congress withdrew Congressional authority of national banks to issue national bank notes as part of the nation's currency. This withdrawal by Congress of its constitutional

power to regulate currency to such extent (Const., Art. I, cl. 5; *Amoskeag Savings Bank* v. *Purdy*, 231 U. S. 373 [1913]; *cf. Smith* v. *Davis*, 323 U. S. 111 [1944], a power as supreme as the borrowing power, *Society for Savings* v. *Bowers*, 349 U. S. 143 [1954]; *Free* v. *Bland*, 369 U. S. 663 [1962]), *simultaneously* withdrew from national banks their status as Federal instrumentalities and clearly terminated all need for further protection theretofore secured by constitutional supremacy or by § 548, *supra*, originally enacted pursuant thereto in order to safeguard the currency. Consequently, national banks thereafter ceased to be Federal instrumentalities.

The precise reason for the enactment of the National Bank Act of 1869, as its title specifically states, was to "* * * Provide a National Currency, secured by a Pledge of United States Bonds and to Provide for the Circulation and Redemption Thereof" (13 Stat. 99). This must be compared with the similar title to the Federal Reserve Act (38 Stat. 251) which provided "An Act to provide for the establishment of Federal reserve banks, to furnish an *elastic currency*, * * *", and with the fact that the *nation's currency* since 1935 is issued by the Federal Reserve System as Federal Reserve Notes which "shall be obligations of the United States" (Title 12, U. S. C. A. § 411).

Up to this time (1935) Congress had the right to permit national banks "to facilitate the performance of governmental functions—[and] . . . the right to protect the operations thus validly authorized" (*cf., e. g., Pittman* v. *Home Owners' Corp.*, 308 U. S. 21, 32-33 [1939]; *Federal Land Bank* v. *Kiowa Co.*, 368 U. S. 146, 151 [1961], as corporations which are true Federal instrumentalities, *supra*). But when the governmental function is withdrawn, the protection is likewise withdrawn, since while it may be true

that "when Congress Constitutionally creates* a corporation through which the Federal government lawfully acts, the activities of said corporation are 'governmental'—not proprietary" (*Federal Land Bank* v. *Bismark Co.*, 314 U. S. 95, 102 [1941]; *Federal Land Bank* v. *Kiowa Co.*, 368 U. S. 146, 151 [1961]; see also *Callam County, Washington et al.* v. *United States* and *United States Spruce Production Corp.*, 263 U. S. 341 [1941]; *Pittman* v. *Home Owners' Corp., supra*, 308 U. S. 21 [1939]). Indeed, national banks stand today upon no different tax footing under the governmental immunity doctrine from, for example, those proprietary functions performed by the States which have been held subject to federal taxation for want of implied governmental immunity in the other direction (see *e. g., Helvering* v. *Gerhardt*, 304 U. S. 405 [1938]; *Allen* v. *Board of Regents*, 304 U. S. 439 [1938]; *New York* v. *United States*, 326 U. S. 572 [1945]; *Wilmette Park Dist.* v. *Campbell*, 338 U. S. 41 [1949]; *Parden* v. *Terminal R. Co.*, 377 U. S. 184, 196 [1963]).

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* Here, of course, national banks are not *created* by Congress—they merely came into being of their own volition under permissive legislation (Title 12, U. S. C. A. §§ 21, *et seq.*).

CONCLUSION

The Petition for Rehearing should be granted so that the cause may be heard on its merits or, in the alternative, the decision below should be vacated and the cause remanded for reconsideration.

Dated: February 25, 1969.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

October Term, 1968.

DICKINSON, COMPTROLLER *v.* FIRST NATIONAL BANK OF HOMESTEAD, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA.

No. 741. Decided January 20, 1969.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

MR. JUSTICE STEWART is of the opinion that probable jurisdiction should be noted.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.